No. 621. Of October Term, 1900.

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JAMES H. MCKENNEY.

Brf. of Johnson for Respondents

IN THE

Supreme Court of the United States.

Filed April 29, 1901.

IN EQUITY.

Ex Parte **WILLIAM E. HALE, as Receiver for the Collection and Enforcement of the Liability of Stockholders of the Northwestern Guaranty Loan Company (a Corporation), Petitioner,**

IN THE MATTER OF THE PETITION FOR WRIT OF *CERTIORARI* REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO CERTIFY TO THE SUPREME COURT FOR ITS REVIEW THE CASE OF W. E. HALE, RECEIVER, APPELLANT, *vs.* EDWARD P. ALLINSON *ET ALS.*, APPELLEES.

RESPONDENTS' BRIEF.

JOHN G. JOHNSON,
For Respondents.

Allen, Lane & Scott Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

William E. Hale, Receiver, Appellant,

vs.

Edward P. Allinson et als., *Appellees.*

October Term, 1900.

No. 621.

IN THE MATTER OF THE PETITION FOR WRIT OF *Certiorari* TO CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT TO REVIEW CASE OF W. E. HALE, RECEIVER, APPELLANT, *vs.* EDWARD P. ALLINSON *et al.*, APPELLEES.

RESPONDENTS' BRIEF.

The petitioner filed a bill in equity in the Circuit Court, as Receiver appointed in proceedings instituted in the Minnesota courts, at the instance of creditors of The Northwestern Guaranty Loan Company, against said company, and against certain of the stockholders thereof, resident in Minnesota, wherein, as he averred, there had been an ascertainment of the amount of the corporation's liabilities and the value of its assets. He claimed that under the Constitution and laws of Minnesota, each stockholder in case of such deficiency of assets of the corporation, was obliged to contribute towards the meeting such deficiency an amount not in excess of the par value of his

shares; that the amount of the deficiency had been ascertained in the aforesaid proceedings to be so great as to require that every stockholder should contribute the maximum amount for which he could be held liable; that it had been therein decreed that each stockholder should pay an amount equal to the par value of his shares; that he had been therein appointed Receiver to collect from the stockholders said amounts; that the forty-seven defendants named in his bill were, respectively, holders of shares in said corporation each in an amount therein stated; and that it was the duty of each to pay to him, as such Receiver, the amount equal to the par value of his shares.

Demurrers were filed by the present respondents, which rested substantially upon three grounds: (1) that the case was not within the equity jurisdiction of the court; (2) that no stockholder who had not been a party defendant in the proceedings in Minnesota was bound by anything therein done in the way of determining the amount necessary to be contributed by the stockholders; and (3) that a Receiver appointed in a foreign litigation had no power to prosecute suits in other jurisdictions.

The court below, without deciding the second and third grounds of demurrer, sustained the first, and held that inasmuch as the suit was one instituted in equity by a Receiver to compel forty-seven different persons to pay amounts due by each under his separate contract with the corporation, there was an adequate remedy at law, and no jurisdiction in equity.

The Circuit Court of Appeals affirmed the judgment of the Circuit Court upon the ground that there was an adequate remedy at law, and a lack of jurisdiction in equity.

None of the questions suggested by the petitioner in his petition and brief are necessary to be determined.

If this court shall be of the opinion that the question as to the equitable jurisdiction is one of such difficulty as requires it to issue a writ of *certiorari*, it will, of course, grant such writ; but we respectfully submit that if it be of the contrary opinion, it will not deem it necessary to determine, in a cause in which, because of lack of juris-

diction in the court below, there could be no valid determination, questions which may arise in some other action if the same be properly instituted.

The theory of the petitioner in the court below was that by certain proceedings in Minnesota it had been conclusively determined that each of the respondents was obliged to pay a specific amount of money. Accepting, for the purposes of the suit brought, the theory thereof, the respondents claimed that there was a several and distinct demand of a specific amount of money, from each of several respondents, each of whom could defend only because of his own individual defense.

The respondents therefore contended that forty-seven different litigants, each alleged to be bound to pay because of his or her separate contract a specific sum of money, could not be bound together as joint defendants in equity where each must defend upon individual grounds.

The petitioner in the court below seemed to think that because each defendant claimed there was no jurisdiction in equity, he was entitled to tie all together as joint defendants, because each rested his defense upon the same point of law. Further, he seemed to think that because there were forty-seven of these defendants, a court of equity ought to be allowed to intervene.

In support of their contention that the action of the Circuit Court in refusing to take equitable jurisdiction was proper, the respondents printed an argument substantially in the words which we repeat, and by its reproduction, will say all we desire, in opposition to the motion for a writ of *certiorari*.

Before discussing the question of jurisdiction, it may be well to ascertain, by an examination of the bill, and the argument of the petitioner in support thereof, the exact position maintained by him. Such examination will show, under his theory as to what was concluded by the Minnesota litigation, that his suit in equity, against forty-seven parties, to collect against each an amount due upon his contractual obligation, as a holder of shares, was of such nature as left to each defendant but one of two defenses,

viz., that he was not a shareholder, or that he had paid the amount claimed from him. In other words, that, though under the theory of the bill, nothing remained to be done by each of said forty-seven persons but to pay the amount claimed under his separate contract, or to show payment, or the non-existence of the stockholding relation, yet all these persons could be joined in one suit in equity in which they would be obliged to make good their respective separate defenses.

Let us, therefore, in the first instance, see (1) what the bill claimed; (2) what the petitioner avers with regard to the defenses open to the defendants; and (3) what points were raised by the demurrer.

***First.*—As to what was claimed by the bill.**

It averred that the forty-seven defendants were respectively holders, to the extent in each case designated, of the shares of stock of The Northwestern Guaranty Loan Company, a corporation of Minnesota; that twelve thousand five hundred shares at the par value of $100 per share had been issued; that on the twentieth day of May, 1893, the corporation had been duly adjudged insolvent and a Receiver of its corporate assets had been appointed; that since that date it had not had, or conducted, any business; that in the course of its business it had contracted indebtedness to an extent of upwards of $3,000,000; that under and by virtue of the Constitution and general laws of Minnesota each stockholder assumed personal and contractual liability for the indebtedness of the corporation to the amount of the par value of his full holdings of stock for the equal and common benefit of the corporate creditors, to be enforced in proceedings, as indicated by the general statutes of the State; that on or about the first day of November, 1893, an unsatisfied judgment creditor of said company, after a return of an execution thereon unsatisfied, had filed in a District Court of Minnesota County a bill in equity on behalf of himself and all other creditors of said Loan Company against it

and against all and several the stockholders thereof, for "the purpose of enforcing the aforesaid liability of such "stockholders, and to that end, amongst others, for an "accounting of the debts and assets of said corporation, "the ascertainment of the deficiency, the apportionment "and assessment of such deficiency amongst the several "stockholders, and for the appointment of a Receiver for "the purpose of enforcing and collecting such assessment "or ascertained liability all and several;" that process had been duly served on said corporation and such of the stockholders thereof as resided within the State of Minnesota; that no service had been made upon the defendants; that said District Court, on the eighth day of February, 1897, had adjudged that an indebtedness of upwards of $3,000,000 was owing by said Loan Company to its several creditors; that the value of the total assets and properties of the company was $450,000 and no more; that the total outstanding stock of the company was twelve thousand five hundred shares at the par value of $100 each; that the names of the several stockholders, including defendants, and the amount of stock held by each were as specified; that each stockholder was liable to contribute, for the common benefit of the creditors, an amount equal to the par value of the stock held by him; that each of the stockholders within the State of Minnesota had been adjudged to pay and contribute a sum equal to the par value of the stock held by him; that W. E. Hale had been appointed Receiver for collecting and enforcing, for and in behalf of all the creditors, the judgments against such Minnesota stockholders and for the purpose of collection, by such proceedings as might be proper, the ascertained liability of non-resident stockholders of said Northwestern Guaranty Loan Company, over whom the court, by reason of non-residence, had not acquired jurisdiction for the purpose of rendering personal judgment; that said funds thus collected were to be held by the Receiver for the purpose of equal *pro rata* distribution amongst the creditors, subject to the further order of the court; and that the court had held it would

retain jurisdiction of the cause for the purpose of making other and further orders or decrees in the matter of distribution and otherwise, as might be necessary to protect the rights of the several parties in the premises.

The bill averred thus:—

> The decree hereinbefore recited ascertaining the necessity for and amount to which stockholders should contribute, is conclusive in that regard on all stockholders of said corporation; that said decree cannot be executed without and beyond the limits of the jurisdiction of the State of Minnesota without the aid and interposition of equity in enforcing said decree in or by ancillary proceedings; that the several defendant stockholders herein are liable to contribute to a fund on behalf of the creditors of said corporation in amounts equal to the par value of their respective holdings of stock.

It prayed as relief:—

> That said defendants and each of them, may, if they can, show cause why they and each thereof should not be adjudged liable, to pay and contribute to the extent of the par value of their several holdings of stock for the equal benefit of the creditors of said corporation.

It will be observed that the bill did not claim it was filed to avoid a multiplicity of suits; nor that there were any grounds of defense common to all the defendants. On the contrary, it averred that the proceedings in Minnesota concluded the defendants, and that to the extent they were holders of shares it was their duty to pay an amount equal to the par value thereof. It prayed against each, a decree of payment of an amount equivalent to the par value of the shares by him, or her, held. It amounted to nothing more than an attempt to collect, in one suit against all the stockholders, the amount which it was claimed, each was separately obliged to pay. Upon its theory, every possibility of a defense was lacking other than one special in the case of each stockholder.

Much is said, by way of argument, in the petitioner's brief, to the effect that Judge McPherson conjured into existence imaginary defenses for the purpose of defeating the equity of the bill. The answer to all thus said is, that

the bill itself was founded upon the assertion that there were no defenses other than those which must be separate in the case of each stockholder, because resting solely upon the question of the fact of his holding and of the non-payment of what was claimed against him.

***Second.*—As to the theory of law with regard to the scope of the defense and the rights of the complainant, upon which the bill was rest[illegible].**

The petitioner rests his bill upon the decision in Hale *vs.* Hardon, 95 Fed. Rep., 747, 754, and upon the decision by the Supreme Court of Minnesota in Hanson *vs.* Davison, 76 N. W. Rep., 254.

The petitioner claims that what was said by this court in Hancock National Bank *vs.* Farnum, 176 U. S., 640, concerning the effect of a finding, as against the corporation itself, of a fact which when thus found was binding upon all interested in the corporation, is applicable to a case in which a fact was found as against creditors not concerning assets of the corporation, but concerning a matter relevant only *quâ* the liability of stockholders to creditors. He therefore quotes, as the law of this case, what was there said in these words:—

> We do not mean that it is conclusive as against any individual sued as a stockholder, that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it. Ball *vs.* Reese, 58 Kan., 614. In that case it was said, correcting an inference which was sought to be drawn from language in the case of Howell *vs.* Manglesdorf, 33 Kan., 194, in respect to the effect of a judgment against a corporation (pages 617, 618):—
>
> "The general holding in this court has been that a judg-"ment is final and conclusive between the parties and their "privies; and we think it must be held that every stockholder

"in a corporation is so far privy in interest in an action "against the corporation that he is bound by the judgment "against it. In the absence of fraud and collusion, the judg- "ment must be held to be final and conclusive against the "stockholder if the court rendering it has final jurisdiction. "As the judgment was valid, the court committed error in "allowing the defendants to go behind it and contest matters "which were conclusively settled by the judgment against the "corporation." * * *

Now, as the judgment rendered in the Kansas court is in that State not only conclusive against the corporation, but also binding upon the stockholder, it must, in order to have the same force and effect in other States of the Union, be adjudged in their courts to be binding upon him, and the only defenses which he can make against it are those which he could make in the courts of Kansas. The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the Act of Congress be secured.

The bill therefore averred that the proceedings in Minnesota were conclusive; and that there was no matter of fact, or of law, in which the divers stockholders were interested as a whole. The case is argued in this court upon the same theory.

It is not within the power of the Receiver to claim that a court of equity has jurisdiction of a matter, by way of avoidance of a multiplicity of suits, which, as he presents it, involves no such question of multiplicity, and no question of common defenses.

Had he presented his bill upon any other theory, claiming that there must be an ascertainment, in this court, of the amount to be paid, and that all questions had not been settled in the Minnesota court, his bill would have failed by reason of what was decided by the Circuit Court of Appeals for the Third Circuit in the Elkhart case, 87 Fed. Rep., 252.

It is true that by way of demurrer the defendants set

up a lack of equitable jurisdiction, as well as a claim that they were affected by no proceedings in which they had not been served, in the course of which facts had been found against them, and that a Receiver appointed in a particular litigation has no extra-territorial jurisdiction. The court, however, must determine whether a bill is well grounded in equity, not because of the defenses thereto, but because of the grounds for equitable relief therein stated.

If the Receiver was right in his contention as to the conclusiveness of the proceedings and as to his extra-territorial power, he was entitled to recover against each defendant in an action instituted in a court of common law. If, however, he was not right in his contention in those respects, he was not entitled to proceed either in equity or at common law.

***Third.*—As to the ground of demurrer which was sustained in the court below, viz.: The bill did not present a case within the jurisdiction of a court of equity.**

The petitioner has put his equity upon four grounds, which may thus be summarized: (1) That the right sought to be enforced is an equitable one; (2) that the bill seeks to enforce a decree of an equity court, and is therefore maintainable in another court of equity; (3) that equity has jurisdiction of a cause even though the relief asked for is merely the payment of money; and (4) that the petitioner is entitled to equitable relief because of the necessity of avoiding a multiplicity of suits.

We will discuss the question of equitable jurisdiction under four propositions:—

1. *The right sought to be enforced by the petitioner is not an equitable one.*

2. *No decree heretofore made in any court against the appellees is sought to be enforced against them in the present bill.*

3. *The bill asks nothing more than a money decree, without presenting any equitable ground of relief.*

4. *Where there are several and distinct causes of action against different defendants under circumstances such as characterize this case, the exercise of equitable jurisdiction is not justified upon any such grounds as the avoidance of multiplicity of suits, or for any other reason.*

1. THE RIGHT SOUGHT TO BE ENFORCED BY THE PETITIONER IS NOT AN EQUITABLE ONE.

In support of his contention that the right which he seeks to enforce is an equitable one, the petitioner said in his brief in the court below (page 8):—

> The right, so far as creditors are concerned, is in common and equal; that the purpose of the liability is to create a fund, and the obligation of the stockholder to contribute to that fund; that the liability is not an asset of the corporation, or enforceable by it or its successors in interest, as Receiver, assignee or otherwise; and, finally, that it is to be made available in the equitable proceedings indicated, brought by or on behalf of the creditors themselves directly, and in such further proceedings as may be necessary to extend the relief so as to embrace all stockholders subject to the liabilty.

We are not dealing with a bill in equity filed in the lower court by a judgment creditor against the corporation and all the stockholders, seeking to ascertain the extent of the deficiency of the corporation assets and the amount of contribution necessary to be made by the stockholders under their statutory liability. The present bill is not of the nature we have just outlined. It is based upon no such foundation. If it was, it would be demurrable, as was the bill in the Elkhart case, for lack of proper parties. It is a bill which avers that in proceedings alleged to be conclusive, the extent of the contribution of each stockholder was ascertained and a Receiver was appointed to collect from each stockholder the amount therein ascertained to be necessary to be paid by him.

The bill is based upon the duty imposed upon each stockholder, by the statute or Constitution of Minnesota,

as a contractual obligation, to pay an amount equal to the par value of his shares. It avers that the maximum of liability, viz., the payment of such equivalent amount, has been conclusively determined. In what possible aspect can this contractual obligation, or statutory duty, be claimed to be an equitable right? Each stockholder enters into an obligation, imposed by the statute because of his holding of shares, to pay, in case of a deficiency of corporation assets, to an extent not exceeding the par value of his shares. After the extent of the payment has been settled by a court of equity, the transaction is precisely as though the statute had originally obliged each stockholder, in case of corporation insolvency, to pay a fixed amount, equal to the par value of his shares. If the amount had not been previously conclusively ascertained, the bill must fail. If, as the petitioner claims, it has been thus ascertained, nothing remains for the defendant but to pay a designated amount or to show that he is not a stockholder or has discharged his obligation.

It is true a Receiver is seeking to collect under a duty on his part, after he has collected, to account to another court of equity having control, it is claimed, of the distribution, for the amount of his collections. This, however, does not in any way affect the question of whether the cause of action is equitable or legal. It is the duty of a Receiver to account for, and to distribute, in accordance with the rights of those interested in his collections, whether the latter be made in law or in equity. A trustee may have a right of action against a third person, but the fact that a suit is brought by such trustee does not give jurisdiction to a court of equity if the action is only cognizable by a court of law.

The method of distribution of the fund, after its collection, through the action of a court having no control over the distribution, does not affect the question of the proper form of the action in the forum of collection.

Concede that the liability of the stockholders to pay is not an asset of the corporation or enforceable by it, we must still deal with the fact that the method of its collec-

tion must be determined by the nature of the liability, and that courts of common law are amply sufficient to give all necessary relief to those resting their claims upon contractual or statutory liabilities.

We must not lose sight of the fact that the present bill begins and ends with a demand for the payment of money averred to be due by each person who is a stockholder of the insolvent corporation.

After such collection, the Receiver must distribute in another forum, which has no control of the method of collection, and can at best do nothing more than command that the alleged obligation shall be collected by its Receiver.

The statutes of Minnesota give to a judgment creditor, after the insolvency of a corporation, the right to enforce the statutory liability after ascertainment of the total amount of the deficiency of corporate assets. The original proceeding must necessarily be in equity, and if, by the court taking the original jurisdiction, all the stockholders can be served, it will have power to make and to enforce its decrees against them. As against stockholders not served, however, if the petitioner is right in his contention, the court taking original jurisdiction may authorize a Receiver to collect what it shall have found to be due from them, as well as from the stockholders actually served. This court, under the bill as filed, can deal with nothing except the claim of the Receiver to collect an ascertained and fixed sum of money resulting from a *quasi*-contractual obligation. It cannot, and, as petitioner claims, it need not, enforce equitable remedies prior to an ascertainment of the sum to be paid. Its jurisdiction, therefore, necessarily, must depend upon the nature of the claim to it presented.

2. NO DECREE HERETOFORE MADE IN ANY COURT AGAINST THE APPELLEES, IS SOUGHT TO BE ENFORCED AGAINST THEM IN THE PRESENT BILL.

We do not care to question the proposition that a court of equity may entertain jurisdiction of a bill against a de-

fendant which seeks to enforce against him a decree in equity made in another court. A court of equity did enforce such anterior decree in the case of Shields *vs.* Thomas, 18 Howard, 253. In that case Shields had appeared as defendant in a Kentucky equity court, where a final decree was entered against him, which was sought to be enforced in the Iowa Federal court of equity. This court dwelt upon the necessity, under the circumstances of the case, for the exercise of equitable jurisdiction in Iowa.

In the present case, however, it is not claimed by the petitioner that any decree was ever entered against the defendants. On the contrary, he admits they were not served in Minnesota; he avers that all the prerequisite proceedings necessary to ascertain the amount each holder of shares must pay, have been concluded; and claims that a person not even decreed to be a stockholder shall pay, if found to be a stockholder, the maximum sum required by the statute. So far as regards any proceeding against the appellees fixing them specifically with liability, the case in this court is "*de novo*."

If the theory of the petitioner be correct, each stockholder, *quâ* the payment of an amount equivalent to the par value of his shares, is in the position in which a stockholder owing unpaid subscriptions on his stock would be, after the levy of an assessment covering what is unpaid.

3. THE BILL ASKS NOTHING MORE THAN A MONEY DECREE. IT DOES NOT REST ITS DEMAND UPON ANY EQUITABLE GROUND OF RELIEF.

We concede that a court of equity may, under certain circumstances, entertain jurisdiction of a bill demanding the payment of money. Such jurisdiction will not be entertained, however, simply because money is demanded. On the contrary, if money and nothing more be demanded, and if the bill does not disclose equitable grounds of relief, it will be demurrable.

As we have seen, however, the present bill is framed

upon the theory of a duty upon each stockholder to pay the equivalent of the par value of his stock, after ascertainment in Minnesota that the assets of the corporation to the full extent of the equivalent of the par value of all its shares are insufficient for the payment of its debts.

This court is not asked to find, and, under the framework of the bill cannot find, a fact cognizable only, or better there than elsewhere, in a court of chancery.

We concede that where it is necessary to apply to a Chancellor for equitable relief, he may proceed with the whole case thus presented to him and may administer final relief, even to the extent of ordering money to be paid. His right to order the money paid, depends, however, upon some need for equitable relief stated in the bill. No such relief is shown by the bill to be necessary and nothing is asked for excepting a decree for money.

4. WHERE THERE ARE SEVERAL AND DISTINCT CAUSES OF ACTION AGAINST DIFFERENT DEFENDANTS UNDER CIRCUMSTANCES SUCH AS CHARACTERIZE THIS CASE, THE EXERCISE OF EQUITABLE JURISDICTION IS NOT JUSTIFIABLE UPON ANY SUCH GROUND AS THE AVOIDANCE OF MULTIPLICITY OF SUITS OR FOR ANY OTHER REASON.

The petitioner rests his right to equitable relief, largely upon the ground that it is necessary to avoid multiplicity of suits. In support of his contention he has shown much learning, considerable ability and very great ingenuity.

It is not necessary for us to enter into a controversy with him concerning certain general propositions, amounting almost to platitudes, which he has stated. We contend that the burden is upon him to show that he has presented by his bill a foundation for equitable jurisdiction. We concede that the right of trial by jury guaranteed by the Constitution of the United States does not exclude the jurisdiction of a court of equity to such extent as such courts had exercised a jurisdiction which excluded such trial. We do contend, however, that every citizen is entitled to a trial by a jury saving in a cause within well-de-

fined limits of equity jurisdiction, and that, unless the circumstances are of such character as require equity to interpose, he cannot be compelled to fight his litigation in a general battle involving not merely himself, but other litigants with whose success, or failure, he has no concern.

The obligation of each stockholder is several and distinct, and rests upon his own special contract with the corporation, implied by reason of statutory provisions imposing liability upon him under certain circumstances. Primarily there is no reason why A., who is indebted to the creditors of a corporation by reason of his contract with them implied by a statute ordering him to pay a sum not to exceed a specified maximum, in case of deficiency of corporation assets, shall be joined in a suit against B. and C. seeking to enforce against them their separate and distinct contracts. The stockholders are indebted, if at all, not jointly, but severally. We have heretofore admitted that it may be necessary to join them all with the corporation in a suit having for its purpose the marshaling of assets, the taking of an account and the determination of the extent of a deficiency. All these things, however, as the petitioner claims, have been done. Nothing in this respect remains incomplete. Why, therefore, if the Receiver is entitled to treat the obligation of each defendant as now reading as though he had agreed to pay specifically an amount equal to the par value of his shares, is he not obliged to sue each upon his contract separately?

This court, in Kennedy *vs.* Gibson, 8 Wallace, 505, as Judge McPherson has shown, declared:—

> Where the whole amount is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such a case an interlocutory decree may be taken for contribution, &c.

This declaration, as Judge McPherson has shown, has been followed in almost the latest case upon the subject, decided by the Circuit Court of Appeals of the Sixth Circuit, in Bailey *vs.* Tillinghast, 99 Fed. Rep. 801.

We would be very sorry to deny that courts of equity

have taken cognizance of actions for the purpose of avoiding a multiplicity of suits. This, however, must not be confounded with the attempt made by the petitioner to induce a court of equity to take cognizance in one suit of many separate causes of action at common law against many separate defendants, because of the number of the latter. A Receiver of an insolvent bank may find himself in the possession of a large number of promissory notes, given to the bank by many different persons. It would probably be more convenient for him to join them all in one suit in equity, than to bring separate common-law actions against each. No one, however, would suppose, because of the inconvenience resulting from many suits, that he could join them. It might be, that every note might raise a question as to its being properly stamped, and that each defendant would defend upon the same ground of improper stamping because of a misunderstanding which had universally prevailed, as to the stamping required, when the notes were executed. It would hardly be contended that because the defense rested upon the same point of law, all the makers of the notes could be joined as defendants in one suit in equity.

As we have said, it is the right of each defendant, to have a common-law trial of litigations not within the cognizance of equity courts, and to insist that the proceedings against him shall be so conducted that he will not be exposed to the expense and inconvenience of a joinder of other persons as defendants for whose success he does not care.

If, therefore, the Receiver's case is as he asserts, so peculiar in its character that he should be permitted to avail himself of equitable remedies because of the insufficiency of those afforded by the common law, it is his duty to satisfy the court of the existence of such peculiarity. The burden is upon him, of establishing the existence of that which ought to deprive the defendant of his *prima facie* right to a jury trial and to an action confined to himself.

Upon the petitioner's theory, the only defense which can be interposed by any defendant, is the non-holding of the

shares, or the fact of payment of what is alleged to be due by him. This defense, in the case of each defendant, is separate and distinct. There is no community of interest or of defense or in the proof upon which the latter must rest. The effect of the joinder of all the defendants is, to compel each defendant to participate in proceedings more voluminous and extensive than they would be if confined to his own cause. Even if the theory of the petitioner be incorrect and if other defenses are open, each defendant will be prejudiced in that part of his case which concerns his separate and distinct defense, by the joinder with others who have no interest therein. It must, therefore, be conceded that a strong case of inability to proceed adequately in a common-law action, must be established by the complainant. In what respect is a court of common law unable, if the Receiver is right as to his ability to collect and as to the conclusiveness of the Minnesota proceedings, to afford adequate relief? The present Receiver, in Hale *vs.* Hardon, found himself able to recover at common law the amount of his claim. He asserts, however, that by joining all the forty-seven defendants in one suit he will avoid multiplicity of actions. If, however, his right is several and distinct as against several defendants, it is his duty to bring as many actions as there are defendants. The fact of his having many claims, does not justify his enforcement of them saving in accordance with settled principles. He pretends that each defendant, as to a part of his defense, can set up the same matter, and that because thereof, all should be obliged to maintain one defense, although the cause of action is several, resting upon separate contracts, and although, as he concedes, each may deny the existence of any liability by himself because of the non-existence, in his particular case, of the relation from which it is claimed to result.

As we have heretofore said, the right of a Receiver, to claim equitable jurisdiction, depends, not upon the defenses which may be interposed, so much as upon the nature of the case which he sets forth. He claims, as we have said, that there is an absolute, incontestable, duty,

on the part of each defendant, if a shareholder, to pay. He does not ask for equitable relief upon the ground that the various defendants are interposing a defense which is common to all and ought to be settled in one controversy. For this reason it is impossible for him to succeed in his demand that a court of equity, in the present controversy, because of its right under certain circumstances to take jurisdiction of a cause to avoid multiplicity of suits, should take cognizance of the present suit, which does not make any averments of facts out of which the jurisdiction could be evolved. *Non constat* that the defendants will raise any other ground of demurrer than the lack of equity in the bill. The latter, as we have said, must stand upon its own averments.

Apart from this, however, we submit with the utmost confidence that there exists in the present case none of those circumstances which have induced the courts in the instances cited by him to assume equitable jurisdiction.

It is only necessary to read the cases which he cites, and to become apprised of the circumstances under which courts of equity acted, to satisfy ourselves that the present action presents no such situation as demands the relief in those cases accorded.

A person who avers that some one is about to do some act claimed to be illegal, which if done will create a large number of supposed rights which will require thereafter to be litigated separately, may ask a court of equity to interpose by injunction to prevent the doing of such act, for the purpose of saving such subsequent multiplicity of suits. There is no analogy between such a ground for equitable interposition and that presented in the present cause.

Again, whilst persons may hold separate claims against a particular property, courts of equity have interposed and have permitted a joinder of all the claimants upon averments that the separate claims rested upon one title as against the party demanding relief.

Other cases can be found in which, as prerequisite to judgment, it was necessary to take complicated accounts,

or to ascertain facts, or even legal rights in which many persons were interested where the proceedings could be conducted without prejudice to the rights of any one, and almost demanded the joinder of all concerned.

None of these cases, however, is similar to the present, where a separate contract is sought to be enforced against the defendants who ought to be kept separate, in a suit in equity in which all are joined. The petitioner says all the defendants may assert, although his bill does not aver they will, that the proceedings in Minnesota, to which they were not parties, did not affect them, and that a Receiver, appointed in Minnesota, has no right to demand recognition in the court of another State for the purpose of therein enforcing claims.

These defenses, however, are not peculiar to the cause before this court. They are the assertions of general principles of law. To assume equitable jurisdiction in one action, of distinct claims, because the different defendants will avail themselves of general principles of law, would be anomalous.

The title to five or six distinct pieces of real estate, held by five or six different persons, derived from different predecessors, may all rest upon the assertion of the rule in Shelly's Case. Would this justify proceedings in equity to recover possession by a person claiming all of them? All the defendants agree, by demurring, in a defense, that the bill presents no ground for equitable relief. Does this justify their joinder, though the causes of action against them be separate, in one proceeding in equity? We concede that cases may be found in which the courts have held, where a great number of defendants as against the claimant of a whole tract, maintain the existence of a title common to all, that such defendants may be joined in a proceeding in which all will be compelled to assert, or to defend, the common title. No court, however, has held, because of the fact that several defendants, against whom there are several causes of action, appeal to the same settled legal principles, that they can be joined in one suit.

We repeat, therefore, that *prima facie* there is no right

to equitable relief in the petitioner; that it is his duty to show clearly, that unless accorded equitable relief he will not be able to succeed; and that he has utterly failed to establish the inability of courts of common law to grant him all the relief, if any, to which he is entitled. We repeat, that unless the petitioner successfully maintains the burden which is imposed upon him, each defendant has a right to demand a separate suit against himself in a forum having jurisdiction, and none the less, because many other defendants may rest their defenses upon the same general principles of law to which he will appeal.

We may concede that as common-law remedies develop their inadequacy, equitable relief may be accorded; but we deny that the petitioner has shown, in this case, any inadequacy, such as justifies the extraordinary procedure he has pursued.

It is not necessary to consider, in detail, the large number of authorities which the learning of the counsel of the petitioner has enabled them to assemble in their brief. We meet them with the general remark that, excepting possibly in the case of Hale *vs.* Hardon alone, we do not challenge their correctness; but we claim that they furnish no foundation for the demand of equitable relief in the present controversy.

The cases in which one plaintiff has been permitted to proceed in equity against many defendants, or in which many plaintiffs have been permitted to proceed against one defendant, because of a common ground of claim or of defense, are radically different from the present. In many of them the right to relief depended upon the ascertainment of facts in which all the persons joined had a common interest, although the results to each might be distinct. In most of them the issue of fact common to all could better have been determined in a case in which all were joined, than in separate suits. In very many of them there was a necessity to join all the parties in order to obtain any relief. The cases (and they have almost all involved other equitable reasons for interference) in which a question of law has been held sufficient to justify proceeding in equity

because of all being interested alike in its establishment or denial, are those in which such question was only necessary to be determined in the particular case, and was not one of those general principles which constitute part of the general body of law. No such general principle as that no one can be concluded by legal proceedings in which he is not a participant, or that one court is not obliged to recognize the right therein of a Receiver appointed by another, were ever held sufficient to give the jurisdiction claimed in this controversy.

Outside of the demurrer, which rests upon the want of jurisdiction in equity, the remaining demurrers rest upon the denial of the right of the Receiver to sue in any forum. They rest upon no question of fact. Surely, if the Receiver sued at common law, it would be his duty to prove there had been proceedings which concluded the stockholders, settling their duty to pay the amount demanded, and which entitled him to enforce such duty. The defendants need do nothing until the establishment by the Receiver of the vesting in him of the right of the creditor to proceed, without the ability in the defendants to question the amount of his claim. Can a Receiver, because it is necessary for him to establish his right to proceed at all, force a defendant, entitled to the decision of a common-law tribunal, into a court of equity? The cases in which courts of equity have taken jurisdiction have always been those in which the questions of fact, or of law involved, were those which went to the existence of any cause of action, not merely to the capacity in which the plaintiff claimed.

The petitioner (page 11) said in his brief in the court below:—

> The asserted obligation of defendants is referable to a common origin, *i. e.*, the Minnesota law, constituting the contract between stockholders and creditors. The right to assert the obligation is equally referable to a common origin, *i. e.*, the decree in the parent proceeding ascertaining the conditions precedent to its enforcement as against all stockholders. And finally, the right of complainant to proceed in behalf of

and as representative of all creditors in interest, presents a common question equally affecting all the defendants and in which they are similarly interested. The rights of all parties in interest have therefore a common origin and present similar questions of law and fact decisive of the issues involved.

The Minnesota law, "constituting the contract between "stockholders and creditors," imposes an obligation upon the stockholders of all corporations. Can Receivers of several corporations collect in one suit in equity against the different stockholders of different corporations, because of the common origin of the obligation, *i. e.*, "the "Minnesota law"?

What possible foundation for the exercise of the jurisdiction of a court of equity exists, by reason of the fact that a decree in Minnesota ascertained, if it did ascertain, as petitioner claims, conclusively, that it was necessary for each holder of shares to pay an amount equal to the par value of his holding? The condition precedent to a suit at common law, is the ascertainment of the amount per share to be paid by each stockholder. Thus ascertained, the obligation results from the Minnesota statute, not from the Minnesota legal proceedings.

The complainant does, or does not, have a right to proceed because of his appointment as Receiver to collect from each stockholder. If he does not possess such right, he cannot proceed. If he does, the nature of his proceeding must depend upon the nature of his action against each stockholder. Upon his theory, there is no common question, "equally affecting all the defendants." Each defendant is entitled to a defense, special to himself. The right of a Receiver depends upon general principles of law. A defendant does not avail himself of these principles, under penalty of losing his right to a trial by jury and to a separate action.

The whole ground upon which the Receiver rests his right to proceed in the anomalous way he has adopted, is, that if he sues at common law, the several stockholders separately, upon their several statutory or contractual ob-

ligations, he will be compelled, as against each, to show that the condition precedent to his right to sue, viz., the legal ascertainment of the deficiency, has been performed, and he will also be compelled to establish his right to recognition in the forum in which he sues. It will be necessary for the Receiver to produce in each case, if the proceedings accomplish what he claims, a certified copy thereof. Would this necessity justify him in depriving the defendants of their common-law right to be sued separately? It would be necessary for him to prove, as against each defendant, the fact of his being a stockholder. Would this justify him in putting all the stockholders into one suit? Every lawsuit involves the necessity of proof by the plaintiff of the facts therein averred. This does not justify him, because he has many suits, in joining all the suitors in one proceeding.

Suppose the complainant had brought forty-seven actions at law against forty-seven defendants, would he have been involved in any difficulty because of the multiplicity of suits which would have justified him in demanding equitable relief? In the one suit, to the same extent as would have been requisite in several, he must prove as against each defendant, the fact of his holding shares, and must meet an issue of whether or not the defendant is a holder and of whether or not he owes the money.

Would he be exposed to any difficulty in establishing by forty-seven arguments, before any of the judges of this court, in case of the forty-seven suits being brought here, the legal principles lying at the basis of his right to proceed, *i. e.*, the conclusiveness of the Minnesota proceedings and the right of the Receiver to be here recognized?

What is meant in most of the cases, by jurisdiction in equity to avoid a multiplicity of suits, is admirably illustrated in Smyth *vs.* Ames, 169 U. S., 518, where the stockholders of a corporation were permitted to file a bill against a corporation and against certain State officials who were seeking to enforce an alleged unconstitutional State law interfering with rates of transportation, because

of the necessity of avoiding a multiplicity of suits. All the parties were before the court who were interested in the question. By its determination in advance, the court prevented the doing of acts out of which suits innumerable would have necessarily sprung.

Another type of cases in which equity has taken jurisdiction to avoid multiplicity of suits, is presented by Hayden *vs.* Thompson, 71 Fed. Rep., 60, where stockholders had received dividends illegally paid out of capital. A Receiver was permitted to join all the stockholders who had thus received these illegal dividends in order to avoid multiplicity of suits. The case was one essentially for a court of equity, because it involved the necessity of taking a complicated account of corporation dealings, in which account all the stockholders against whom the proceedings were instituted were equally interested.

In Hawkins *vs.* Glenn, 131 U. S., 319, a decree was entered in the first instance making an assessment upon the stockholders. Thereafter, in an action at law in another Circuit Court, the stockholder was made to pay the amount of the assessment. There is no difficulty whatever, therefore, in obtaining efficacious relief at common law. As we have said, in another circuit, in Hale *vs.* Hardon, this relief at common law has been actually accorded to the present Receiver.

In Cockrill *vs.* Cooper, 86 Fed. Rep., 7, an accounting as to the transactions of a corporation was essential to any relief. It was pre-eminently necessary that this accounting should be taken in one proceeding. All were equally interested in the results of such accounting, and no injury could possibly result in the shape of destruction of separate defenses, by sustaining the jurisdiction.

In Terry *vs.* Little, 101 U. S., 218, it was held that the liability of the stockholders was not to any particular creditor, but to all, and that therefore, in any original proceeding for its enforcement, it was necessary to resort to a court of equity to marshal the assets and to procure contributions to such extent as should be found necessary under the accounting from all the shareholders.

In Bailey *vs.* Tillinghast, 99 Fed. Rep., 804, the Receiver of an insolvent bank sued in equity to enforce an assessment against stockholders, where such assessment was less than the full amount of their liability. The court quoted approvingly what has been said by Mr. Justice Swayne in Kennedy *vs.* Gibson, 8 Wallace, 498, to the effect that when the whole amount is sought to be recovered, the proceeding "must be at law," and that "where "less is required, the proceeding may be in equity, and "in such case an interlocutory decree may be taken for "contribution, and the case may stand over for the further "action of the court, if such action should prove to be "necessary, until the full amount of the liability is ex-"hausted."

In the Tillinghast case there was a necessity for an accounting, and under such accounting it became necessary for the court to go on and administer complete relief.

The court there said that they could rest the equitable jurisdiction upon the necessity of avoiding a multiplicity of suits. It added that there was a common question in the case between the Receiver and the defendants, viz., the question whether the latter were released from their stock subscriptions by the fact that, whereas the resolution for increasing the stock in the sum of $300,000 was that under which their subscription took place, yet subsequently, by proceedings to which they did not consent, the proposed increase had been reduced to $150,000.

We close our observations by asserting that equity has never assumed jurisdiction of a common-law action and has never forced several people against whom exist several claims resting upon separate contracts, into the defense of one such action, under circumstances like those existing in the present case, which presents an absolute absence of all reasons for pursuing the extraordinary course which has been adopted.

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